UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THE HOME INSURANCE COMPANY,	***)***	
Plaintiff	***)***	
v.	***)***	***Civil No. 98-229-P-C***
ST. PAUL FIRE & MARINE INSURANCE COMPANY, et al.,	***)***	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION TO AMEND COMPLAINT AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Home Insurance Company ("The Home") filed the instant diversity action on June 22, 1998 against St. Paul Fire & Marine Insurance Company ("St. Paul") and six nominal defendants, seeking a determination of St. Paul's duty to defend and provide coverage for state-court litigation against a law firm and two attorneys covered by policies from both. Complaint for Declaratory Judgment ("Complaint") (Docket No. 1).[1] On December 16, 1998 the state-court action settled. Affidavit of David A. Grossbaum ("Grossbaum Aff.") (Docket No. 15) ¶ 6; Release and Indemnity

[1]The nominal defendants are Ralph Bruno, Port Resort Realty Corporation, Harbor Lights Realty Trust (Ralph Bruno, Trustee), Richard P. Romeo, Alan S. Nelson and Smith, Elliott, Smith & Garmey, P.A. (formerly known as Smith & Elliott, P.A). Complaint ¶¶ 3-8.

Agreement, attached as Exh. J thereto. The Home now seeks to amend its complaint in view of the settlement, and both The Home and St. Paul cross-move for summary judgment. Motion and Memorandum of The Home Insurance Company To File an Amendment to Its Complaint, etc. ("Motion To Amend") (Docket No. 10); Defendant St. Paul Fire & Marine Insurance Company's Motion for Summary Judgment (Docket No. 6); The Home Insurance Company's Motion for Summary Judgment (Docket No. 13). For the reasons that follow, I recommend that St. Paul's motion for summary judgment be granted, and those of The Home to amend its complaint and for summary judgment be denied.[2]

I. Motion To Amend Complaint

Pursuant to Fed. R. Civ. P. 15(a) a party must seek leave of the court to amend a pleading if either the deadline to amend has expired or the party already has amended its pleading once within the time allotted by the rule. Such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend should be granted in the absence of reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962). A court has the discretion to deny a motion to amend if it believes that, as a matter of law, amendment would be futile. *Demars v. General Dynamics Corp.*, 779 F.2d 95, 99 (1st Cir. 1985).

The Home filed its motion to amend on January 26, 1999. Motion To Amend at 1. Per the

[2]The Home and St. Paul each request oral argument on their motions for summary judgment, and St. Paul requests oral argument on the motion to amend. Docket Nos. 9, 16 & 19. Because I am satisfied that the written submissions of the parties adequately address the issues raised, their requests for oral argument are denied.

court's scheduling order, pleadings were to be amended in this case by November 6, 1998, discovery was to be completed by January 22, 1999 and motions were to be filed by January 29, 1999. Scheduling Order (Docket No. 5). The Home argues that its motion nonetheless is timely insasmuch as it relates to settlement of the underlying lawsuit in this case, which was not effectuated until December 16, 1998. Motion To Amend at 3-4. The Home, moreover, notes that it kept St. Paul apprised of developments in settlement negotiations, promptly informing St. Paul in September 1998 that settlement negotiations were under way and that it was "cautiously optimistic" about the outcome. *Id*. at 4; Letter from Anthony A. Trask to Richard Suter dated September 28, 1998, attached to Affidavit of David A. Grossbaum ("Second Grossbaum Aff.") (Docket No. 11). On or about December 22, 1998 The Home demanded that St. Paul contribute to defense and settlement costs, stating that "[b]ecause the settlement in this matter was not allocated, St. Paul will be unable to carry its burden and St. Paul will be responsible for the entire amount of the indemnity." Letter from David A. Grossbaum to Richard L. Suter dated December 22, 1998, attached to Second Grossbaum Aff.

St. Paul cannot claim prejudice, The Home contends, inasmuch as St. Paul conducted no discovery until December 24, 1998, at which time it sought information regarding allocation of the settlement amounts. Motion To Amend at 4; discovery papers attached to Second Grossbaum Aff.

St. Paul views The Home's motion through a sharply different lens, perceiving undue delay, prejudice and futility. Defendant St. Paul Fire & Marine Insurance Company's Memorandum in Opposition to Plaintiff's Motion To Amend Complaint ("Amendment Opposition") (Docket No. 18) at 1. St. Paul observes that The Home's proposed amended complaint entails more than a mere technical update. *Id*. at 1-2. The Home seeks to add a new theory of liability: that on the basis of

St. Paul's alleged breach of its duty to defend, St. Paul is responsible for the entire amount of the settlement paid in the underlying lawsuit. *Id.*; *compare* proposed Amended Complaint for Declaratory Judgment (Docket No. 10) ¶¶ 26-30 *with* Complaint ¶¶ 28-30. This theory, St. Paul contends, first surfaced in The Home's letter of December 22, 1998. Amendment Opposition at 2.

Even assuming *arguendo* that The Home's motion to amend was timely filed and worked no appreciable prejudice to St. Paul, I consider St. Paul's third objection — that assertion of The Home's new theory of liability would be futile — both meritorious and sufficient to counsel denial of the motion. Amendment Opposition at 5-9. For the reasons discussed below, I find that St. Paul had no duty to defend or indemnify with respect to the underlying state-court action. The question of its proportionate liability for settlement payouts accordingly would not be reached.

II. Cross-Motions for Summary Judgment

A. Applicable Legal Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the

court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). In cases such as this, involving cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

B. Factual Context

The following undisputed facts are material to the grounds upon which I base the summary-judgment portion of this recommended decision.

In or about November 1995 Ralph Bruno, Port Resort Realty Corporation ("Port Resort") and Harbor Lights Realty Trust ("Harbor Lights") brought a state-court action against Richard P. Romeo, Alan S. Nelson and Smith, Elliott, Smith & Garmey, P.A. ("S,E,S&G")[3] ("Bruno Action"). Complaint ¶ 16; Defendant St. Paul Fire & Marine Insurance Company's Answer, etc. ("Answer") (Docket No. 3) ¶ 16. On or about February 13, 1996 Bruno, Port Resort and Harbor Lights amended their complaint. First Amended Complaint and Jury Demand, *Bruno v. Romeo*, Docket No. CV-95-559, Superior Court, County of York, State of Maine ("Amended Bruno Complaint"), attached as Exh. D to Defendant St. Paul Fire & Marine Insurance Company's Statement of Uncontroverted

[3]I will refer to both S,E,S&G and Smith & Elliott, P.A., as the firm previously was known, as S,E,S&G.

Facts ("St. Paul's SUF") (Docket No. 8).

The Amended Bruno Complaint charged that in the course of legal representation relative to Port Resort's purchase of the Shawmut Inn Hotel and Restaurant ("Shawmut Inn") in Kennebunk, Maine in 1989, the defendants *inter alia* failed to obtain a written construction loan commitment from Bank of New England to Port Resort. *Id.* ¶¶ 8, 17, 20. As a result, the plaintiffs asserted, the Bank of New England declined to honor its oral agreement to lend Port Resort $4 million in construction funds, leading to the collapse of the Shawmut Inn project, harming the plaintiffs' credit and causing Bruno significant emotional distress, financial hardship and damage to his reputation. *Id.* ¶¶ 23-26, 47-48.

The Amended Bruno Complaint also alleged that S,E,S&G did the following in 1995:

1. Disclosed, without authorization, the contents of the plaintiffs' files to others, including Bernard F. Shadrawy, Jr. and Joseph D'Jamoos, two Port Resort shareholders who had brought a separate action against S,E,S&G. *Id.* ¶¶ 9, 35, 37.

2. Contacted Bruno to obtain a statement for use in the Shadrawy lawsuit that allegedly was adverse to Shadrawy and D'Jamoos but was detrimental to Bruno. *Id*. ¶¶ 38-39.

3. Contacted, without the plaintiffs' authorization, other prior counsel of the plaintiffs, subsequent to the filing of the Bruno Action, in an effort to obtain confidential information obtained during legal representation. *Id*. ¶ 40.

4. Repeatedly refused to make the plaintiffs' files available to them or their current counsel. *Id*. ¶¶ 41-45.

The Amended Bruno Complaint stated claims for malpractice (Count I, apparently 1989 conduct), breach of fiduciary duty (Count II, 1989 and 1995 conduct), constructive fraud (Count III,

apparently 1989 and 1995 conduct), breach of loyalty (Count V, 1989 and 1995 conduct), conversion (Count VI, 1995 conduct), negligent infliction of emotional distress (Count VII, apparently 1989 and 1995 conduct) and intentional infliction of emotional distress (Count VIII, apparently 1989 and 1995 conduct).[4] *Id*. ¶¶ 46-70.

The Home issued a lawyers' professional liability policy to S,E,S&G, Policy No. LPL-F-667812, for the period April 6, 1991 to April 6, 1992. Complaint ¶ 10; Answer ¶ 10; *see also* Provisions section of policy attached as Exh. A to St. Paul's SUF ("Home Policy"). Romeo and Nelson are insureds as defined in that policy, which has a single limit of $3 million, aggregate limits of $3 million and a deductible of $25,000. Complaint ¶ 11; Answer ¶ 11. The Home Policy contains the following relevant provisions:

> **Section B - Coverage**
>
> **I. Professional Liability and Claims Made Clause:** To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.
>
> ***
>
> PROVIDED ALWAYS THAT such act, error or omission happens:
>
> **(a)** during the policy period; or,
>
> **(b)** prior to the policy period, provided that prior to the effective date of the first Lawyers Professional Liability Insurance Policy issued by this Company to the Named Insured or predecessor law firm and continuously renewed and maintained in effect to the inception of this policy period:

[4]The Amended Bruno Complaint contains no Count IV. *See id*. at 10-11.

1) The Insured did not give notice to any prior insurer of any such act or error; and

2) the Named Insured . . . had no reasonable basis to believe that the Insured had breached a professional duty or to foresee that a claim would be made against the Insured; and

3) there is no prior policy or policies which provide insurance for such liability or claim, unless the available limits of liability of such prior policy or policies are insufficient to pay any liability or claim, in which event this policy will be excess over any such prior coverage, subject to this policy's terms, limits of liability, exclusions and conditions.

***

Section E - Limits of Liability

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IV. Multiple Insureds, Claims and Claimants: . . . Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period or optional Reporting Period in which the earliest claim arising out of such act, error or omission was first made, and all such claims shall be subject to the same limits of liability.

***

Section G - Conditions

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II. Other Insurance: Subject to the limitation of coverage as set forth in Section B COVERAGE I.(b) for prior insurance, and Section B COVERAGE V. for insurance procured subsequent to termination of practice, this insurance shall be in excess of the amount of the applicable deductible of this policy and any other valid and collectible insurance available to the Insured whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of liability provided in the policy.

Home Policy at 1-2, 6, 8 (emphasis in original).

St. Paul issued a renewal lawyers' professional liability policy to S,E,S&G, Policy No.

GL00622725, with effective dates of April 6, 1995 through April 6, 1996. Complaint ¶ 14; Answer ¶ 14; *see also* Lawyers Professional Liability Protection — Claims-Made section of policy attached as Exh. B to St. Paul's SUF ("St. Paul Policy"). Romeo and Nelson are insureds as defined in that policy, which has a single limit of $3 million, aggregate limit of $5 million and a deductible of $25,000. Complaint ¶ 14-15; Answer ¶¶ 14-15. The St. Paul Policy contains the following material provisions:

> **What This Agreement Covers**
>
> We'll pay amounts you and other protected persons are legally required to pay to compensate others for loss that results from a negligent act, error, or omission committed in the performance of legal or notary services. . . .
>
> ***
>
> *Legal services* include those you perform while serving in a fiduciary capacity such as: Trustee. Executor. Administrator. Guardian. Or Conservator. But we'll only cover you in your fiduciary capacity to the extent you would be legally responsible as attorney in the usual attorney-client relationship.
>
> ***
>
> **When This Agreement Covers**
>
> We'll cover claims first made against a protected person while this agreement is in effect. The claim must be based on a wrongful act that occurred while this agreement was in effect. We must also be notified of the claim while this agreement is in effect.
>
> We'll also cover claims as explained in the following three sections:
>
> **1. Prior acts.** We'll cover claims based on wrongful acts that occurred before the effective date of this agreement, but only if all the following conditions are met:
>
> • The protected person involved had no knowledge of the prior wrongful act on the effective date of this agreement, nor any reasonable way to foresee that a claim might be brought.
>
> • The claim is reported to us while this agreement is in effect. And

• Any other insurance covering the claim has been used up.

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Other Insurance

Other insurance may be available to pay for a claim covered by this agreement. If so, we'll pay no more than our percentage of the total amount of insurance covering the claim, less the deductible. . . .

There is one exception to this rule. It applies when the claim is based on a wrongful act that occurred before this agreement began. We'll pay up to the limit of coverage that applies only after any other insurance covering the claim is used up.

St. Paul Policy at 1, 3-4 (emphasis in original).

Upon notification of the filing of the Bruno Action, the Home advised S,E,S&G that it would defend the action under a full reservation of rights. Letter from Marie Faulhaber to Richard P. Romeo dated November 16, 1995, attached as Exh. C to St. Paul's SUF, at 1. It further noted: "As you are aware, we have appointed counsel to defend you in the lawsuit brought by Mr. Shadrawy and Mr. D'Jamoos. The Home Insurance Company is handling both pieces of litigation under one claim file . . . ." *Id*. (emphasis in original).

St. Paul, upon notification of the filing of the Bruno Action, disclaimed any obligation to defend or indemnify Romeo, Nelson or S,E,S&G. Complaint ¶ 20; Answer ¶ 20. By letter dated March 1, 1996 St. Paul amended its position, agreeing to provide coverage to Romeo, Nelson and S,E,S&G with respect to the Bruno Action on an excess basis once coverage by The Home had been exhausted, and subject to a reservation of rights. Letter from Michael Spinelli to Richard P. Romeo dated March 1, 1996, attached as Exh. F to Grossbaum Aff., at 5. St. Paul explained:

In view of the fact that the alleged wrongful acts set forth in plaintiff's Complaint occurred prior to the inception date of our claims-made policy, the protection afforded under the policy, is defined under the Prior Acts insuring agreement . . . .

> You will note that the coverage afforded thereunder is triggered when "any other insurance covering the claim has been used up."

Id. at 4.

Following amendment of the Bruno complaint The Home advised St. Paul that "based upon allegations of malpractice which fall into your policy period, The St. Paul should be responding to this claim on a primary basis. It is our belief that The St. Paul is responsible for, at a minimum, a pro-rata share of the legal fees and expenses that have been incurred as well as future legals and indemnification, if any." Letter from Marie Faulhaber to Michael Spinelli dated October 4, 1996, attached as Exh. F to Grossbaum Aff. On or about November 22, 1996 St. Paul denied that it provided concurrent primary coverage. Complaint ¶ 23; Answer ¶ 23.

On or about May 29, 1997 The Home again demanded that St. Paul acknowledge a concurrent duty to defend and indemnify with respect to the Amended Bruno Complaint. Letter from David A. Grossbaum to Michael Spinelli dated May 29, 1997, attached as Exh. G to Grossbaum Aff. St. Paul was unpersuaded. Letter from Michael Spinelli to David A. Grossbaum dated July 31, 1997, attached as Exh. H to Grossbaum Aff. On June 22, 1998 The Home filed the instant declaratory-judgment action. Complaint at 1.

On December 16, 1998 the Bruno matter settled. Release and Indemnity Agreement, attached as Exh. J to Grossbaum Aff. The Home expended nearly $500,000 in defense and indemnification of the case. *Id*.; Letter from Theodore H. Kirchner to David A. Grossbaum dated January 22, 1999, attached as Exh. I to Grossbaum Aff.

C. Discussion

The Home identifies two bases upon which St. Paul should have joined in the defense and

indemnification of the Bruno Action: (i) that the acts alleged to have taken place in 1995 fell within the period of St. Paul's policy coverage, triggering a duty to defend the entire complaint and to indemnify on the 1995 claims, and (ii) that the Home and St. Paul policies contain "mutually repugnant" clauses seeking to escape liability when another insurance policy applies and, thus, under Maine law, St. Paul should have shared equally in defense and indemnification of the 1989 acts. The Home Insurance Company's Memorandum in Support of Its Motion for Summary Judgment ("Home's Memorandum") (Docket No. 13) at 2-17. I address each in turn.

1. 1995 Acts: Scope of Coverage Issue

The Home first argues that because the 1995 acts alleged in the Bruno Action took place during the effective dates of the St. Paul Policy, St. Paul had a duty to defend and to indemnify with respect to those acts. Home's Memorandum at 2-3, 17. St. Paul disputes such liability on three alternative grounds: (i) that the 1995 acts were not covered by its policy because not committed during the performance of legal services, (ii) that The Home's argument ignores the "related acts" provision of its own policy, under which related claims "whenever made" are considered first made during the policy period in which the earliest related claim was made, and (iii) that the acts alleged were intentional in nature and thus not covered "negligent" acts, errors or omissions. Defendant St. Paul Fire & Marine Insurance Company's Memorandum of Law in Support of Its Motion for Summary Judgment ("St. Paul's Memorandum") (Docket No. 7); Defendant St. Paul Fire & Marine Insurance Company's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Docket No. 26). The first of St. Paul's trilogy of defenses is dispositive of the issue.

Under Maine law, the scope of an insurer's duty to defend is determined by comparison of the provisions of the insurance policy with the allegations of the complaint. *Burns v. Middlesex Ins.*

Co., 558 A.2d 701, 702 (Me. 1989). "If there is *any* legal or factual basis that could be developed at trial, which would obligate the insurer to pay under the policy, the insured is entitled to a defense." *Id*. (citation and internal quotation marks omitted) (emphasis in original). St. Paul argues that the alleged 1995 acts plainly were not committed in the performance of legal services. St. Paul's Memorandum at 8. Rather, they were committed in defense of malpractice lawsuits, falling outside the scope of St. Paul's coverage. *Id*.

The Home counters that the acts complained of entail violations of S,E,S&G's duties of loyalty and confidentiality — duties that would not exist but for the attorney-client relationship between Bruno and S,E,S&G. Home's Memorandum at 4-6. It further asserts that the concept of performance of legal services is broadly construed to include duties owed after legal representation ends. *Id*. at 5-6. Thus, it argues, the 1995 allegations are encompassed within the scope of St. Paul's coverage. *Id*. at 6.

The Home's arguments, while superficially appealing, confront an insurmountable obstacle in the form of the controlling St. Paul policy language. The St. Paul Policy promises to cover only acts, errors and omissions "committed in the performance of legal or notary services." St. Paul Policy at 1. It does not promise to cover any act, error or omission related to or arising out of the performance of legal services. All of the 1995 acts alleged in the Amended Bruno Complaint — the disclosure of files without authorization, the obtaining of a detrimental statement from Bruno, the attempt to obtain confidential information from other counsel and the refusal to turn over files — transpired during S,E,S&G's defense of malpractice litigation, not in the performance of legal services. The fact that S,E,S&G's alleged 1995 conduct implicates the duties that a lawyer owes to a former client cannot transform that conduct into the performance of legal services. Nor did the

Amended Bruno Complaint disclose any set of facts that could have been developed at trial that would have done so. St. Paul accordingly had no duty to defend or indemnify with respect to the 1995 acts.

2. 1989 Acts: Mutual Repugnance Theory

The Home next seeks to hold St. Paul accountable for defense and indemnification of the 1989 acts alleged in the Amended Bruno Complaint on the theory that because the Home and St. Paul policies contain clashing clauses purporting to limit the liability of each when other insurance is available, the court must disregard both clauses and apportion defense and indemnity costs between the two insurers. Home's Memorandum at 9-16. St. Paul defends, in part, with expert testimony purporting to reveal industry practice in overlapping-insurance situations. St. Paul's Memorandum at 9-11; Affidavit of Glenn Michael Bourgeois, attached as Exh. E to St. Paul's SUF. The Home protests the use of any such extrinsic evidence but offers its own expert in the event the court should be tempted to credit that of St. Paul. The Home Insurance Company's Memorandum in Opposition to Defendant St. Paul's Motion for Summary Judgment (Docket No. 23); Affidavit of Conrad Cyriax (Docket No. 25). The relevant policy language is unambiguous. I accordingly decline St. Paul's invitation to peer beyond the four corners of the policies. *See Hanover Ins. Co. v. Crocker*, 688 A.2d 928, 930 (Me. 1997) ("In cases involving the construction of the language of an insurance contract, the meaning of unambiguous language is a question of law.").

The Law Court has identified three types of "other insurance" clauses "that regulate how liability is to be divided when multiple coverage exists." *York Mut. Ins. Co. v. Continental Ins. Co.*, 560 A.2d 571, 573 n.1 (Me. 1989). "The first, a 'pro-rata' clause, limits the liability of any insurer to a proportion of the total loss. The second, an 'escape' clause, seeks to avoid all liability. The

third, an 'excess' clause, provides that the insurance will only be excess." *Id*. To the extent that such "other insurance" clauses are repugnant — such that the existence of each policy purportedly cancels the coverage of the other — the inconsistent clauses are disregarded. *See, e.g., id.* at 573; *Carriers Ins. Co. v. American Policyholders' Ins. Co.*, 404 A.2d 216, 219-20 (Me. 1979). Each insurer must then cover the loss on an equal basis until the policy with the smaller limits is exhausted. *See, e.g., York*, 560 A.2d at 573. Any remaining portion of the loss is then paid from the larger policy up to its limits. *Id*.

"Other insurance" clauses have been held repugnant in cases in which both insurers were deemed to provide primary coverage on a risk. *See, e.g., id.* (York's pro-rata clause repugnant to Continental's excess clause when neither policy expressly made coverage excess and both thus deemed to provide primary coverage); *Carriers*, 404 A.2d at 219-21 (two virtually identical excess clauses held repugnant, and both policies deemed primary, when giving effect to excess clauses would leave no primary insurer). No such repugnance dilemma arises, however, when one insurer provides excess coverage of the risk. In that event, the excess insurer's coverage duty simply is not implicated until the coverage of any primary policy is exhausted. Until that time, the excess insurer offers no other valid, available insurance for purposes of the primary insurer's "other insurance" clause. *See, e.g., Royal Globe Ins. Co. v. Hartford Accident & Indem. Co.*, 485 A.2d 242, 243 & n.1 (Me. 1984) (perceiving no conflict between pro-rata clause in nurse's policy and excess clause in hospital's policy when latter expressly made coverage of nurse as hospital employee "excess over any other valid and collectible insurance"). *See also Cobb v. Allstate Ins. Co.*, 663 A.2d 38, 39-40 (Me. 1995) (because Cobb was operating employer's vehicle, no dispute that employer's automobile policy provided primary coverage and Cobb's personal automobile policy excess coverage).

In the instant case, the Home Policy contains an "excess" variety of "other insurance" clause whereby its insurance is to be "in excess of . . . any other valid and collectible insurance available to the Insured whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of liability provided in the policy." Home Policy at 8. The St. Paul Policy contains a "pro-rata" species of "other insurance" clause pursuant to which St. Paul, as a general matter, will cover no more than its pro-rata proportion of claims covered by other insurance. St. Paul Policy at 4. Both the Home and St. Paul "other insurance" clauses cross-reference a coverage provision for prior acts (*e.g.*, acts occurring prior to the effective date of the policy). *Id*. Under both policies, claims related to prior acts are covered only if several conditions are met — one of which is that (in the language of the St. Paul Policy) "[a]ny other insurance covering the claim has been used up." St. Paul Policy at 3; *see also* Home Policy at 1-2 (coverage for prior acts afforded only if, *inter alia*, "there is no prior policy or policies which provide insurance for such liability or claim, unless the available limits of liability of such prior policy or policies are insufficient to pay any liability or claim, in which event this policy will be excess over any such prior coverage, subject to this policy's terms, limits of liability, exclusions and conditions.").[5]

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[5]Both the Home and St. Paul policies are so-called "claims-made" policies. Home Policy at 1; St. Paul Policy at 1. Such policies are designed to "cover[] the insured for claims made during the policy year and reported within that period or a specified period thereafter regardless of when the covered act or omission occurred." *James J. Mawn Enters., Inc. v. Liquor Liab. Joint Underwriting Ass'n*, 677 N.E.2d 1162, 1164 (Mass. App. Ct. 1997) (citation and internal quotation marks omitted). "A typical claims-made policy covers acts and omissions occurring either before or during the policy period; for prior acts, the policy may provide full retroactive coverage or it may only cover claims arising out of acts and omissions after the 'retroactive date' specified in the declarations." *Id*. (citations and internal quotation marks omitted). Both the Home and St. Paul policies depart from this "typical" handling of prior acts in extending coverage to such acts on several conditions, one of (continued...)

Inasmuch as appears, there is no dispute that The Home Policy by its terms covered the 1989 acts alleged in the Amended Bruno Complaint.[6] *See, e.g.*, Home's Memorandum at 14-15. The question presented is whether the existence of the St. Paul Policy relieved The Home of some or all of that duty. *See, e.g., id.* at 16. This, in turn, hinges on whether an "other insurance" clause (such as that contained in the Home Policy) and a prior-acts provision (such as that set forth in the St. Paul Policy) are mutually repugnant. The Law Court has not had occasion to consider this question, and my research confirms St. Paul's observation that the universe of relevant caselaw from other jurisdictions is small. *See, e.g.*, St. Paul's Memorandum at 1. I am nonetheless persuaded that, were the Law Court confronted with this issue, it would side with the meagre but distinct majority of reported decisions holding that no such repugnance exists.

In three reported decisions, courts have discerned no clash of clauses in cases similar to that at bar. *Evanston Ins. Co. v. Affiliated FM Ins. Co.*, 556 F. Supp. 135 (D. Conn. 1983); *Smith v. Neumann*, 682 N.E.2d 1245 (Ill. App. Ct. 1997); *Chamberlin v. Smith*, 72 Cal.App.3d 835 (Cal. Ct. App. 1977). These courts reasoned that the prior-acts clause created "not a post hac escape clause, but rather an explicit, initial exclusion from coverage." *Evanston* at 138; *see also Neumann* at 1251-52; *Chamberlin* at 850. In each case, the prior-acts clause provided coverage only upon conditions that included the nonexistence of other available insurance. *Evanston* at 138; *Neumann* at 1251;

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[5](...continued)
which is the exhaustion of other available insurance.

[6]St. Paul asserts in its brief that S,E,S&G, Nelson and Romeo were covered by a Home policy effective in 1989, St. Paul's Memorandum at 2, but provides no record support for its assertion. The Home explains that the 1989 acts alleged in the Bruno Action fortuitously related to incidents reported to The Home during its 1991-92 policy period, as a result of which coverage was triggered. Home's Memorandum at 14-15.

Chamberlin at 850. Because, in each case, the underlying claim fell within the scope of coverage provided by another insurer, the condition of the nonexistence of other available insurance was not met. *Evanston* at 138; *Neumann* at 1251; *Chamberlin* at 848. Hence, coverage via the prior-act clause never was triggered. *Evanston* at 139; *Smith* at 1252; *Chamberlin* at 850. This being so, there was no other available insurance for purposes, in two of the cases, of another insurer's "other insurance" clause. *Evanston* at 138; *Chamberlin* at 850.[7]

In one reported decision, upon which The Home heavily relies, a court parted ways with the *Chamberlin* line of cases, finding an excess "other insurance" clause and a prior-acts clause mutually repugnant.[8] *See* Home's Memorandum at 11-12; *Fremont Indem. Co. v. New England Reinsurance Co.*, 815 P.2d 403 (Ariz. 1991). The Arizona Supreme Court in *Fremont* criticized the *Chamberlin* court's reliance on examination of the scope of coverage of the two competing policies. *Fremont*, 815 P.2d at 405-06. The court reasoned that at bottom the two clauses attempted to do the same thing: to avoid coverage if other insurance was available. *Id*. at 406 ("Fremont's alleged exception

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[7]St. Paul also identifies an unreported decision, *RIA Group, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 4871/94 (N.Y. Sup. Ct. June 15, 1998), attached as Exh. A to St. Paul's Memorandum, in which the court followed *Evanston* in finding no mutual repugnance between an "escape" type of "other insurance" clause and a prior-act clause.

[8]The Home, in addition, seeks to distinguish the *Chamberlin* line of cases on grounds that (i) in *Evanston*, the primary carrier provided occurrence, not claims-made, coverage and (ii) the St. Paul Policy, unlike those in *Neumann* and *Chamberlin*, does not house its prior-acts provision in a clearly labelled "Insuring Agreement" or "Exclusions" section. Home's Memorandum at 14-15. The fact that the primary policy in *Evanston* was an "occurrence" policy is immaterial; what mattered was whether another policy, for whatever reason, encompassed the claim within the scope of its coverage. *Evanston*, 556 F. Supp. at 138 (on face of occurrence policy's coverage section, insurer was responsible for defending and indemnifying insured). The fact that the St. Paul Policy's prior-acts language is not labelled a part of an "Insuring Agreement" or "Exclusion" likewise is of no consequence in view of the placement of the language within a section unmistakably dealing with scope of coverage, "When This Agreement Covers." St. Paul Policy at 3.

is actually a textbook escape clause, and we cannot agree with the theory implied in Chamberlin that such a clause is transformed into an exception simply because of its location in an insuring agreement as opposed to another portion of a policy."). Thus, "[w]hen pitted against each other, the policies promote a circuitous debate in which each insurer, claiming that its policy must be read first, refuses to pay at all." *Id*. at 407.[9]

I believe that the Law Court would not be so quick to collapse the distinction between the coverage portions of a policy and a catchall "other insurance" clause. Indeed, the Law Court has considered the scope of policy coverage a critical factor in determining whether two apparently competing clauses conflict. *See, e.g.*, *York*, 560 A.2d at 573 (clauses repugnant when neither policy expressly made coverage excess and both thus deemed to provide primary coverage); *Royal Globe*, 485 A.2d at 243 (no conflict between pro-rata "other insurance" clause and clause providing for excess coverage). Just as the hospital insurer in *Royal Globe* extended coverage in a specific instance (involving employees) only upon exhaustion of other available insurance, St. Paul extends coverage in a specific instance (involving prior acts) only upon such exhaustion. *See, e.g., Royal Globe,* 485 A.2d at 243 (noting that Hartford hospital insurance policy "expressly ma[de] the Hartford coverage of the nurse as a hospital employee 'excess coverage.'"). While the Hartford policy in *Royal Globe* used the word "excess" and the St. Paul Policy does not, the meaning of the St. Paul Policy language nonetheless is crystal clear: prior acts are covered, *inter alia*, only after "[a]ny other insurance covering the claim has been used up." St. Paul Policy at 3. The St. Paul Policy thus does not present a situation in which, for lack of clarity, the court must construe coverage

[9]The Court of Appeals for the Ninth Circuit reached a similar result in an unreported decision, *Continental Cas. Co. v. Home Ins. Co.*, No. 91-35816, 1992 WL 357153 (9th Cir. Oct. 9, 1992), holding an excess "other insurance" clause and a prior-policy clause mutually repugnant.

as primary. *Compare, e.g., Royal Globe*, 485 A.2d at 244 ("In the absence of any language to the contrary, insurance is considered to be primary.").[10]

Far from reflecting an "arbitrary" and "utterly mechanical" decision to favor St. Paul by choosing to read its policy first, *see, e.g.*, Home's Memorandum at 16 (quoting *Carriers*, 404 A.2d at 220), the outcome recommended here is both logical and faithful to the coverage expectations of the insurers. Both the Home and St. Paul policies condition coverage of prior acts on the meeting of comparable criteria, one of which is the exhaustion of other insurance covering the claim. The policies thus are congruent in evincing an intent that the insurer providing coverage at the time of the occurrence and reporting of an alleged wrongful act should bear the primary risk. When it wrote its policy, St. Paul had reason to expect that other insurance might be available to cover risks emanating from prior acts reported to other carriers; The Home could not have counted on the availability of other subsequently written insurance to relieve it from its primary duty.[11]

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[10]To the extent that it can be argued that the Law Court once employed an even stricter formulation of this presumption, pursuant to which it deemed an insurer's coverage to be primary unless expressly stated to be excess, this appears no longer to be the case. *See, e.g., Progressive Cas. Ins. Co. v. Travelers Ins. Co.*, 735 F. Supp. 15, 18-19 (D. Me. 1990); *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 386 (Me. 1989) (noting, in overruling *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914 (Me. 1983), that "the Court in *Baybutt* mistook complexity for ambiguity" in construing insurance policy). The Law Court's most recent formulation of the presumption does not indicate that the word "excess" must specifically be used, but rather that the language used must clearly render the policy "excess." *Skidgell v. Universal Underwriters Ins. Co.*, 697 A.2d 831, 834 (Me. 1997) ("in the absence of language making it excess, insurance coverage is considered primary").

[11]The Home argues that inasmuch as both The Home and St. Paul covered on a claims-made basis, and the Bruno Action was commenced when the St. Paul Policy was in effect in 1995, St. Paul harbored the greater expectation that it would have to cover the claim. Home's Memorandum at 14-15. In both The Home and St. Paul policies, however, the timing of the reporting of a claim or potential claim is also central to the determination of coverage. *See, e.g.*, Home Policy at 1-3; St. (continued...)

Inasmuch as the St. Paul Policy provides only excess coverage as regards prior acts, and the limits of the Home Policy were not exhausted by the payout of approximately $500,000 in the Bruno Action, St. Paul possessed no duty to defend or to indemnify with respect to the 1989 acts alleged in the Amended Bruno Complaint.

III. Conclusion

For the foregoing reasons, I recommend that St. Paul's motion for summary judgment be **GRANTED** and that The Home's motions to amend its complaint and for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of April, 1999.

David M. Cohen
United States Magistrate Judge

[11](...continued)
Paul Policy at 3-4.